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No. 643

In the

Supreme Court of the United States

OCTOBER TERM, 1959

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

v.

J. C. MULLINS, JR.,
Respondent.

SEPARATE APPENDIX UNDER 28 U. S. C. A., RULE 12(1)(f), IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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To the Honorable Supreme Court of the United States:

In support of its petition for a writ of certiorari, the petitioner, Louisiana & Arkansas Railway Company, submits the following statements from the record, which was duly filed in this cause. The indices will follow those of the clerk of the court below, the reference being made to the number utilized by the clerk and the page numbers appearing in each separately numbered document.

QUESTION NO. 1 REPEATED

Whether an injured employee in an FELA case can prove the premium cost to him of a refund annuity, which insures the amount of his monthly earnings, together with speculative increases for the entire period of his life expectancy, utilizing such life expectancy as a multiplicand.

This question was properly raised in the court below and was decided adversely to the petitioner (No. 22, 1 and 2—326 S. W. 2d 263-265).

The complained of testimony was assigned as error in the petitioner's amended motion for a new trial [No. 1, (Transcript) 22-23], assignment of error No. 18 reading as follows:

"18.

"The court erred in overruling the objection of the defendant to the answer of the witness, M. B. Gammill, such answer being as follows:

"'TO THE 15TH DIRECT INTERROGATORY THE WITNESS ANSWERS:

"'Assuming that J. C. Mullins, Jr., was born on August 23, 1916, he would be forty-one years of age on February 12, 1958, the date from which the payments would be made. Using the Commissioner's 1941 Standard Ordinary Mortality Table and a rate of interest of 2½% per annum, compounded annually, I have computed the various specified monthly income payments, single premiums, to be:

"'a. Single premium for $517.00 per month is $126,881.62;

"'b. Single premium for $540.00 per month is $132,526.26;

" 'c. Single premium for $575.00 per month is $141,-115.93;

" 'd. Single premium for $600.00 per month is $147,-251.40;

" 'e. Single premium for $625.00 per month is $153,-386.88;

" '(During the reading of the deposition of Mr. Gammill, the defendant objected to Interrogatory No. 15 and the answer given, and the objection was as follows:)

" 'MR. TOUCHSTONE: The defendant objects to the question and the answer because it is irrelevant and it's incompetent to any issue in the case.

" 'THE COURT: Objection overruled.

" 'MR. TOUCHSTONE: Exception.

" 'MR. BRIAN: Now, in connection with the deposition, Your Honor, we offer in connection with the deposition, without reading, the Exhibits "A", "B", and "C", attached to the interrogatories of Mr. Gammill, identified by him and attached, initaled as requested.

" 'MR. TOUCHSTONE: The same objection to the exhibits, they are irrelevant and incompetent to any issue in the case, and move that they be withdrawn from the jury.

" 'THE COURT: I overrule the objection.

" 'MR. TOUCHSTONE: Note our exception.'

" 'This assignment is also directed to the Exhibits "A", "B", and "C", which were objected to. Such evidence was incompetent, illegal and irrelevant to any legitimate inquiry, because it injected an illegal, improper and highly prejudicial element of damages into the cause which does not exist under the Federal Employers Liability Act; that the defendant railroad is not responsible for its negligence, and any sum of money must be reduced or discounted by deducting

> therefrom annually an amount equal to the rate of interest at which such sum could be safely and securely invested during the period for which such damages may be allowed. The injection of the cost of an annuity policy for the full life expectancy of the plaintiff is therefore an illegal and improper measure of damage which is not provided for by the Federal Employers Liability Act and therefore the injection of such issue was prejudicial to the right of the defendant railroad and was reasonably calculated to cause the return of a verdict of $150,000.00 in this cause, that the introduction of such cost based upon hypothetical increases in wages was purely conjectural and speculative and therefore was no basis for the introduction of such evidence.'"

The above quoted testimony by the actuary Gammill appears in the statement of facts No. 2, 587-598.

Petitioner also moved to strike the entire deposition, including Exhibits A, B, and C, which were calculations of the actuary, using the life expectancy as a multiplicand. Such motion appears at pp. 599-600 of statement of facts No. 2.

The action of the court in overruling such motion to strike was duly assigned as error in its amended motion for a new trial, such assignment being here quoted:

"19.

> "The court erred in overruling the defendant's motion duly made in the absence of the jury to strike the deposition of M. B. Gammill and withdraw the same from the consideration of the jury for the reason that such deposition in its entirety injected improper, prejudicial and baseless elements of damages in the cause and allowed the jury to consider improper, illegal

and irrelevant damages based upon an erroneous construction of the Federal Employers Liability Act." [No. 1 (Transcript) 23].

The deposition of the actuary Gammill, which included the above quoted testimony, was the only evidence before the jury upon the issue of present cash value of the award for loss of earning capacity under the FELA. That the purpose was to secure and insure a monthly income to the plaintiff, contrary to the provisions of the FELA and the decision of this Court and the interpretations placed thereon by this Court, is fully apparent by the following quotation from the argument of the Honorable C. A. Brian, one of the attorneys for the plaintiff:

> "Now, you heard the testimony of the actuarial expert which is without contradiction in this record, this man's life expectancy is 28.43 years; in other words, men his age normally will be expected to live an additional 28.43 years and that was calculated from February 12, 1958; that what this man has before him, is 28.43 years average life expectancy. Oh, it might be said: 'Well, he won't live that long,' by the same token he might live a lot longer, this is the average of what men and women his age live. So, on this basis of his earnings as of February 1st being $588.60, we have taken a figure of $575.00 a month, and if you were listening and can remember Mr. Gammill's testimony you will find that a single payment made now necessary to bring an average of $575.00 a month over the remainder of his life expectancy, that single payment would have to be $141,115.93. In other words, on this basis this man could reasonably be expected to lose, without one single further increase in his earning power from now on, without a nickel's worth of increase, he could reasonably be expected to lose in earnings the sum of $156,411.41." (pp. 6 and 7 of the argument of C. A. Brian; No. 6.)

That there was no intention on the part of plaintiff to follow the formula under the FELA is further apparent from the argument by the Honorable Franklin Jones, another of the plaintiff's attorneys:

> "* * * He couldn't be a capitalist, the purpose of this testimony of Mr. Gammill was to show you what that money would amount to, what it would take to pay him his monthly wage just like any other wage earner, he's accustomed to having it coming in every month, just take it down and pay the refrigerator man and the automobile man and everybody else. Now, for that reason we asked this man to figure out, as those questions show in the deposition, figure out just what it would take to give this man a certain earning per month, and he did that, and he said of course it would make some interest on it, so I am going to discount it on account of that interest, and when I do that I will figure it to where with the interest and the total sum if it was paid so much a month that the interest and money would both be gone; now, that's his figures, we have got here, I know of no other way to arrive at the present value of this money and that is to get a person skilled in that field. * * *" (P. 8 of the argument of Franklin Jones; No. 10.)

QUESTION NO. 2 REPEATED

Whether an injured employee can prove and recover as an element of damages under the FELA loss of his love and affection for his wife and daughter and mistreatment of his wife and daughter after the injuries, together with the pain and suffering which such injured employee caused them.

Such question was duly and properly presented to the court below and was decided adversely to the petitioner. (Opinion of the court below No. 22, pp. 3 and 4; 326 S. W. 2d 263, pp. 265-266.)

The petitioner duly objected to the introduction of such harmful evidence in the trial court and duly excepted to the action of the court in overruling such objections; petitioner likewise objected to the prejudicial incidents which occurred during the trial by reason of the injection of such issue into the cause. The objections and exceptions appear in connection with the following assignments of error, which appeared in the petitioner's amended motion for a new trial [No. 1 (Transcript) pp. 13-14, 26-31] and were duly presented to the trial court, but were overruled. Such assignments of error being:

"3.

"The Court erred in overruling the hereinafter duly and properly made objection to erroneous, incompetent evidence which was introduced on the part of the plaintiff over such objection, because such evidence enabled the plaintiff to inject the issue of love and affection on the part of the plaintiff's family to him and on his part to his family, which issue and element of damages was illegal, improper and highly prejudicial to the rights of the defendant railroad. Such objection and the erroneous evidence admitted occurred while the plaintiff was on the witness stand and is quoted:

"'Q. Now, what was his attitude, Mr. Winans, toward his family in those days?

" A. Well, I don't know how to express that.

"'Q. Well, did he have, appear to have an interest or—

"'MR. TOUCHSTONE: If the court please, that's going into a matter that we believe under the Federal Employees' Liability Act is not a proper element of the nature of damages.

"'It's, of course, highly prejudicial and inflammatory, and is not recoverable under the act, and we object to it.

"'MR. BRIAN: My attitude about it is, of course that the question of physical and mental pain—

"'(Jury excused from the courtroom.)

"'MR. TOUCHSTONE: I will state my objection again, Your Honor. This suit is under the Federal Employees' Liability Act and it fixes the sole beneficiary as the plaintiff, and is to recover for him pecuniary benefits. The members of his family, his wife or others in his family are not beneficiaries and they are not parties, and they are given no part by this Act of Congress in the recovery. And now he is seeking to go into a matter about the nature of his relationship with his family to show the benefit to the members of the family that this family man was. A very praiseworthy thing of course, but under the Federal Employees' Liability Act it is not recoverable, and certainly is prejudicial and inflammatory, and the defendant objects to any testimony along that line.

"'MR. BRIAN: Well, our view about that is simply this, Your Honor. That any testimony which tends to show a change in the personality of this man is a damage to him in the sense that it shows physical and mental changes. Now, that's a part of the damage recoverable under the Federal Employees' Liability Act by him, because if his, just as his physical ability has been altered. If this ability to get along with his family or to act as the head of a household has been altered, that's an item that's just as recoverable in the way of mental changes as physical changes would be.

"'MR. JONES: The type of evidence to be offered is symptomatic of brain damage, and that is personality change. All the doctors will tell you that, so the

only way we know to prove the symptoms is to show how the man acted before and how he acted after. I presume that could be connected up.

" 'MR. TOUCHSTONE: The trouble about that is, the fallacy in it is you can't let it in for one purpose without it being effective for all purposes, and this man is the only person that has any ownership in this cause of action, and it inevitably brings in the family loss and family's suffering at seeing him different, and it's highly prejudicial and damaging to the defendant, and we don't think it ought to go in for any purposes. Now, if it was a common law, liability case where the wife is suing or a member of the family is suing, you have a different situation, but here the Act of Congress, known as the Federal Employees' Liability Act, fixes the sole cause of action in the man, and he cannot recover for such things as they are going into now. It can only be for pecuniary benefits, loss of pecuniary benefits, and this is certainly not pecuniary benefits they are going into.

" 'THE COURT: I will overrule the objection and give you full bill, sir.

" '(Jury returns into courtroom.)

" 'Q. My question to you, Mr. Winans, is what's Jack's attitude towards his daughter and his wife, particularly his daughter, was before this collision occurred?

" 'MR. TOUCHSTONE: Same objection on all the grounds * * *.

" 'THE COURT: Yes, sir.

" 'A. I don't know how to explain that to you, he was just as good to her as any man could be to a daughter, I will say that.

" 'Q. Did he seem interested in her welfare?

" 'A. Oh, yes, very much so.

"'Q. And whether or not they seemed to get along very well?

"'A. Yes sir.

"'MR. TOUCHSTONE: Our same objection goes to all of this.

"'THE COURT: Yes sir, I will give you a full bill'." (No. 1, 13-14.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 2 (Vol. 1 Statement of Facts) 162-165.

"22.

"The court erred in overruling the objection of the defendant to the question propounded to the witness, Mrs. Mullins, wife of the plaintiff, reading as follows:

"'Q. And what was his attitude and disposition towards his daughter in those days?

"'MR. TOUCHSTONE: Your Honor, I don't see the relevancy or pertinency of this exception to arouse inflammation and prejudice in the minds of the jury.

"'MR. BRIAN: I expect to show personality changes.

"'MR. TOUCHSTONE: I understand that, Your Honor wouldn't let him go into that with another witness, and we object to going into it now. If the court please, it's not an element of recovery under the Federal Employees' Liability Act, it's restricted to pecuniary benefits, and this does not go in pecuniary benefits, and we object to it because it's not recoverable, and it's not pertinent, irrelevant and highly prejudicial.

"'THE COURT: I will overrule the objection.

"'MR. TOUCHSTONE: Note our exception, and we would like for our bill to go to all this line of testimony.

"'THE COURT: Yes, surely will.

"'What was his attitude and disposition towards his daughter, Mrs. Mullins?

"'Oh, we all had a good time, just a happy home, everybody was always happy.

"'MR. TOUCHSTONE: We object to that on all the grounds stated and further it's not responsive; she's telling about the attitude of all of them in the home.

"'THE WITNESS: Well, he was too.

"'MR. TOUCHSTONE: We move to strike it, Your Honor, because it's not responsive and on all the other grounds. If the court please, I think this is serious, it's the plaintiff's lawsuit, but the act of Congress restricts him to the recovery of pecuniary benefits. Now, we let this witness not only go into his atttude, but the attitude of his wife and daughter which is not relevant and not pertinent and not recoverable under the Act but arouses the prejudicial and inflammatory aspect.

"'THE COURT: I sustain the objection so far as the attitude of his wife or the attitude of his daughter, and just simply as to him, his attitude.

"'MR. TOUCHSTONE: Then we move Your Honor to instruct the jury not to consider her testimony about that, what's been given.

"'THE COURT: Members of the jury, you will not consider any statement made by the witness concerning the attitude of the wife or the daughter at all in this case, and you will not consider it for any purpose, and blot as nearly as you can out of your minds.

"'Q. I am specifically asking, Mr. Mullins, only about Jack's attitude and temperament, don't you understand, never mind yours or Sandras.

"'MR. TOUCHSTONE: Our bill goes to this because it's not recoverable under the Act.

"'THE COURT: Yes.'

"That such effort on the part of the plaintiff's attorney was a successful attempt to inject the issue of love and affection and the loss thereof into the cause, which element was improper, illegal and an attempt to prejudice the defendant railroad before the jury, which prejudice the admonitory instruction could not have removed; that such erroneous injections of such issue into the cause was reasonably calculated to cause and probably did cause the return of an erroneous verdict and the rendition of an improper judgment." (No. 1, 26-27.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 3 (Vol. 2 Statement of Facts), 621-624.

"24.

"The court erred in permitting the witness, Mrs. Mullins, wife of the plaintiff, to testify to the following:

" 'Q. By the way had he ever cried before that?

" 'A. He cried in the hospital.

" 'MR. TOUCHSTONE: That's the same thing, Your Honor, what he did before is like the question of striking her before, that's for prejudicial purposes.

" 'MR. JONES: Your Honor, I want to interpose this thought, how are you going to show a personality change without showing what he was before and then showing the changes afterwards.

" 'MR. TOUCHSTONE: Now, if the court please, what difference could it possibly make in the cause of action created by Congress here for pecuniary benefits, as to whether a man had cried before an accident or not, the thing is absurd on its face.'

" 'MR. JONES: Your Honor, it makes this difference: As all of these doctors have testified, that is one of the symptoms of brain injuries is personality changes; we have got testimony here as to the degree of that injury, and we think we certainly should be allowed to show the symptoms that the doctors say indicates a severe brain injury, and also I don't agree with my friend that the federal act shuts a man down and says your dollars are all that count.

" 'MR. TOUCHSTONE: It's pecuniary benefits.

" 'THE COURT: I overrule the objection.

" 'MR. TOUCHSTONE: Note our exception.

" 'Q. My question right now, Mrs. Mullins, you mentioned his crying after he got home, had he cried any in the hospital at Sulphur Springs or Shreveport, either one, I don't know?

" 'A. Yessir.

" 'Q. Where was that?

" 'A. At Shreveport.

" 'Q. About how many times?

" 'A. Oh, that happened real often.

" 'Q. Well, now, Mrs. Mullins, I now want to ask you the question, had you ever observed your husband cry before he was hurt?

" 'MR. TOUCHSTONE: May we have our same bill to this on all the grounds stated.

" 'Q. Go ahead, Mrs. Mullins, did you understand that?

" 'A. You want me to answer that?

" 'Q. Yes Ma'am.

" 'A. No, he never cried before.

"'Q. Now, how long did he cry when he got home there?

"'A. It just upset him very much getting home, our home to him was just like a strange home, he didn't know anything, he didn't know what room, which room was which.

"'Q. How long did he spend there in bed before being up and about in Greenville?

"'A. Well, he went to bed when he got home, but now he got up the next morning, see, he was able to be up and down at that time, I got him up.'" (No. 1, 28-29.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 2 (Vol. 3 Statement of Facts), 641-642.

"25.

"The court erred in permitting the witness, Mrs. Mullins, wife of the plaintiff, to testify as follows:

"'Q. Well, do you mean that his attitude towards you was different, Mrs. Mullins?

"'A. Yes, he wanted me to do something, I couldn't do anything.

"'Q. Now, is there anything else that you have observed about his attitude or treatment of you and Sandra Gail that was different as compared with the way he was before he was hurt?

"'MR. TOUCHSTONE: Our same objection and bill on the same grounds heretofore stated goes to that question.

"'A. Can I answer.

"'Q. Yes ma'am.

"'MR. TOUCHSTONE: Note our exception.

"'A. Well, he is very harsh now to both of us, and especially to her, he kept her upset and crying; when he first got home she cried, he kept her crying most of the time. She was thirteen, just barely thirteen at that time, and he thought she should do all the work around the house while I tended to him * * *

"'MR. TOUCHSTONE: I don't like to interrupt you, Mrs. Mullins, but if I may address the court, I think the court can see the obviously highly prejudicial and inflammatory effect of the testimony that this witness is now giving. It's what I have been objecting to because under the law assigned to it, and I submit to Your Honor that by the Act of Congress it's not a recoverable element. The wounded feelings of this daughter or this wife, no matter how justified, they are inexplicably interwoven into the sympathy and natural human feelings of the jury, you can't separate them, and it's injecting an element in here that's not recoverable under the Act, but is highly, highly prejudicial and inflammatory to the defendant, and it's incompetent because it's about a matter that, an element that's not recoverable under the law.

"'THE COURT: I overrule the objection.

"'MR. TOUCHSTONE: Except.

"'Q. Now, Mrs. Mullins, with reference to the, what you have described about your husband, * * * strike that. Did your husband ever act that way towards his daughter and you before he was hurt? * *

"'MR. TOUCHSTONE: Our same objection, it was just this same analogy of his striking her that Your Honor ruled out and told the jury not to consider that. It's the same thing except it's a different thing.

"'THE COURT: This is attitude.

"'MR. TOUCHSTONE: No, he asked before, his question was before.

"'THE COURT: His attitude before and his attitude after. I overrule the objection.

"'MR. TOUCHSTONE: Exception.

"'Q. I say did your husband have, did he have that attitude towards you and your daughter before he was hurt?

"'A. No sir.

"'Q. Now, has that attitude or not continued, Mrs. Mullins, right up to this time?

"'A. It's better right now than it was when he first came home.

"'Q. But do you observe any difference in him as compared with the way he was before he was hurt?'

"That such evidence was improper, illegal, and an attempt to prejudice the defendant before the jury, which attempt succeeded in securing the return of the verdict in the sum of $150,000.00; that such error was reasonably calculated to cause and probably did cause the return of an erroneous verdict and the rendition of an improper judgment." (No. 1, 29-30.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 3 (Vol. 2 Statement of Facts), 646-648.

"26.

"The action of the court in admonishing the jury not to consider the following evidence could not have removed the prejudicial effect thereof, because such evidence was inflammatory and improper and a studied attempt to recover for loss of love and affection, anger, on the part of the plaintiff, and mistreatment of his family and was therefore incompetent for

any purpose as an element of damages under the Federal Employers Liability Act, such evidence being:

"'Q. Had you ever been struck by your husband?

"'A. No.

"'MR. TOUCHSTONE: Now we object to that, if the court please, when I object little lady if you would wait a minute till the court can rule before answering. We object to that, it's obviously for inflammatory and prejudicial purposes, and move the court to instruct the jury not to consider that.

"'MR. BRIAN: Well, I object that it is not obviously for inflammatory purposes, it's a recitation of the facts as I understand them.

"'THE COURT: I sustain the objection as to that.

"'MR. TOUCHSTONE: Our motion is that the court instruct the jury not to consider that.

"'THE COURT: Members of the jury, you will not consider the question and answer relative to Mr. Mullins striking his wife prior to this time, and it's withdrawn from your consideration and you will not consider it for any purpose.'

"That such incident was prejudicial to such a degree that its effect could not be removed by the instruction of the court." (No. 1, 30-31.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 3 (Vol. 2 Statement of Facts), 637-638.

"27.

"That the above and foregoing incidents during the testimony of Mrs. Mullins, the wife of the plaintiff,

were planned and studied attempts to inject the issue of loss of love and affection on the part of the plaintiff towards his family, anger, mistreatment of his family, and loss of love and affection towards them, and were so prejudicial and inflammatory in their effect that it could not be removed by any instruction of the court and such incidents and testimony were reasonably calculated to cause and probably did cause the rendition of an improper judgment." (No. 1, 31.)

That the purpose of plaintiff's counsel was to create prejudice, sympathy, and to enhance the verdict of the jury cannot be successfully denied in view of the following prejudicial argument, which was made by the Honorable Joe Chapman: (Italics the writer's.)

"'* * * Are we going to say, 'No, Jack, you get you a broom handle and get you a stick and pick up paper off the school grounds somewheres, we are not going to make the railroad pay you, *we are not going to send your daughter to college*, we are not going to keep you in a state of living that you are accustomed to, no, we are not going to take care of you, no sir, you just get out and do the best you can.' That's not the kind of jury we have got; that's not the way the people in Hopkins County think. * * *'" (pp. 4-5, Argument of Hon. Joe Chapman; No. 8.)

QUESTION NO. 3 REPEATED

Whether in an FELA case the trial court is bound to grant the request of the defendant (petitioner) to charge the jury that the amount of the verdict is not subject to income taxes.

The petitioner as defendant duly and properly requested the court to instruct the jury as follows:

"REQUESTED SPECIAL INSTRUCTION NO. 3

"Gentlemen of the Jury:

"You are charged as a matter of law that an award of damages for personal injuries is not subject to income taxes, or taxes of any character, therefore you will not consider income tax liability or tax liability of any character in your determination of the amount which you award."

Such request was refused by the trial court and the defendant railroad preserved its exception, and assigned such error in its amended motion for a new trial (No. 1, 43, 16). Such point of error was duly urged in the court below, but was overruled without consideration in the opinion. (Brief of appellant, No. 12, 94.)

QUESTION NO. 4 REPEATED

Whether over the objection of the defendant in an FELA case and also in the face of a requested charge the trial court could refuse to submit the correct mathematical formula for the reduction of the award to its present cash value.

The trial court's charge to the jury upon the very controlling and crucial issue of damages reads as follows:

"In arriving at the amount, if any, you allow the plaintiff by reason of the decrease, if any, in his ability to earn money in the future, you are instructed that you will allow the present value thereof only, and make your calculations of the same on the basis of the

amount, if any, found by you, bearing interest at the highest net rate of interest that can be had on money safely invested and secured.

"You will make your answer to the foregoing question such sum of money, if any, as if paid now in cash, will fairly and reasonably compensate the plaintiff for the elements of damage, if any, above set out, and none other." [No. 1 (Transcript) p. 10.]

The petitioner duly and timely objected and excepted to the court's charge in the following language:

"1.

"The defendant objects and excepts to the instructions appended to, immediately following, and a part of Special Issue No. 1, for the reason that the court fails to charge the jury in the words of the Federal Employers' Liability Act, under which this suit was brought, and on the contrary charges the jury in words foreign to and extraneous of said Federal Employers' Liability Act and adds to the elements provided by the Act as recoverable, and inserts in said instruction elements of recovery not contemplated or provided by said Act as follows:

" 'Further, you may take into consideration the mental and physical pain and suffering, if any, that plaintiff has endured from the date of his injury to the present, such mental and physical pain and sufferings, if any, he will in reasonable probability endure in the future, all as a direct and proximate result of his injury.'

"The defendant in objecting and excepting to this charge will respectfully show that the quoted portion of the court's charge is not embraced in, not contemplated nor provided by the Federal Employers' Liability Act and is not legally recoverable by the Plaintiff in this case, all to the prejudice and damage of the Defendant railway company.

"2.

"Defendant objects and excepts to the following paragraph in said instructions immediately following and as a part of Special Issue No. 1 as follows:

> " 'In arriving at the amount, if any, you will allow the plaintiff by reasons of decrease, if any, in his ability to earn money in the future, you are instructed that you will allow the present value thereof only and make your calculations of the same on the basis of the amount, if any, found by you, bearing interest at the highest net rate of interest that can be had on money safely invested and secured.'

because said instruction is upon the weight of the evidence and is not clear, but is confusing and unintelligible to the jury, and because the same does not fit and apply to the facts as adduced in the record before the jury in this case. Said paragraph restricts the right of the jury to take into consideration all of the evidence admitted in the case in arriving at their verdict, and in a sense tells the jury that they must be bound by the deposition of the Plaintiff offered in this case by the witness M. B. Gammill." [No. 1 (Transcript) 53-54.]

Such objections and exceptions were duly assigned as error in the petitioner's amended motion for a new trial, being assignments of error Nos. 1 and 2, pp. 12-13 of No. 1 Transcript.

The petitioner duly and timely requested the following charge upon such issue, which would have correctly charged the jury upon the mathematical formula to be employed by them in the reduction of any award to its present cash value; the first paragraph thereof would have likewise advised the jury that there was no assurance that the

plaintiff would remain in the employ of the defendant railroad for the period of his life expectancy. Such requested charge reads:

"REQUESTED SPECIAL INSTRUCTION NO. 2
"Gentlemen of the Jury:

"In arriving at any sum which you assess as damage because of either impaired or diminished earning capacity in the future, you must take into account the following: There is no assurance that plaintiff, J. C. Mullins, Jr., would have but for the accident and the injuries sustained as a direct and proximate cause thereof, continued in his employment as an engineer or a fireman for the remainder of his life or the expectancy thereof. You must take into account the fact that employees in the position such as that held by the plaintiff at the time of his death are by the rules of railroading subject to seniority; that there could be no assurance that the rule of seniority would have continued plaintiff in such employment for the remainder of his life or for any definite period; you must likewise consider the fact that strained economic conditions and mechanical advancements, inventions or improvements in transportation could result in the curtailment of the number of employees of railroads or the complete abolition of railroads as a means of transportation.

"In answering the above and foregoing issue inquiring with respect to damages, you are instructed that the amount allowed for any decreased ability to work and earn money in the future, if any, and the amount allowed for physical and mental suffering, if any, should be such amount as is the present value thereof, and in determining the present value thereof, you should take into consideration the rate of interest at which money can be safely and securely invested and determine the present value of any amount you may so allow by discounting the same or deducting therefrom annually an amount equal to the rate of interest

at which such sum could be safely and securely invested during the period for which you may allow such damages and make the balance your answer."

The defendant railroad duly presented such charge and preserved such error by assignment in its amended motion for a new trial (No. 1, 42, 15-16).

The action of the trial court was duly preserved as error in the court below, but decided adversely without comment. (R. No. 12, pp. 62, 93.)

FURTHER STATEMENT FROM THE RECORD

It is the petitioner's position that each of the above and foregoing errors, upon which review by this Court is respectfully sought, were fundamentally erroneous as a matter of law and therefore such errors were prejudicial and a denial of a fair trial. Before the petitioner is required to pay the sum of $150,000.00 as damages, it should be confronted with legal and competent evidence which is properly admissible under the holdings of this Court and other Federal Courts and the jury should be properly charged upon the legal measure of damages.

Without waiving such position, but in the event it is the holding of this Court that it must show more than errors of law, petitioner wishes to point out that it has not had a fair trial as a matter of law because of the above and foregoing prejudicial errors, because the record does not sustain a finding of damages in the sum of $150,000.00. The plaintiff (respondent) is not a wheelchair case, an amputee, or a living hulk. He has no difficulty in driving an automobile around his home town of Greenville, Texas. He is able to mow the lawn and trim whatever foliage is in the

yard. [No 2. (Vol. 1 Statement of Facts), 274-286]. The opinion of the court below recognizes the fact that he is not wholly disabled and incapacitated for all gainful pursuits. *(326 S. W. 2d 263, p. 270).*

Respectfully submitted,

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A copy of the above and foregoing Separate Appendix Under 28 U. S. C. A., Rule 12 (1) (f) in Support of Petition for Writ of Certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas has been mailed to the attorneys of record for the plaintiff, Messrs. Jones, Brian & Jones, P. O. Box 347, Marshall, Texas, on the 11th day of January, 1960, along with a copy of the Petition for Writ of Certiorari and notice of filing such petition and the record.

O. O. TOUCHSTONE, *Attorney of Record for Petitioner*